No. 10574

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

JACK W. BAGLEY,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S REPLY BRIEF.

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TOPICAL INDEX.

PAGE

The issue 1

Argument 3

Point 1. Falbo v. United States is not determinative of the issue in the instant case 3

Point 2. Gutman v. United States (C. C. A. 9), No 10488, is not decisive 3

Conclusion 8

TABLE OF AUTHORITIES CITED.

CASES. PAGE

Billings v. Truesdell, U. S. Sup. Ct., decided Mar. 27, 1944 8

Falbo v. United States, 320 U. S. 549 ..... 3, 4, 8

STATUTES.

Selective Service Regulation 625.1 8

Selective Service Regulation 625.2 8

INDEX TO APPENDICES.

PAGE

Appendix A 1

Regulations, Selective Training and Service System:

Sec. 625.1 1

Sec. 625.2 1

Appendix B 4

Opinion of District Court of Appeal 4

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The Issue.

The issue is *not* as stated by the appellee: "May a defendant who has been indicted for his failure to report for induction into the armed forces of the United States defend such failure in a criminal prosecution by collaterally attacking the Board's administrative acts?" (Brief for Appellee, p. 4.)

No such broad contention is made by the appellant. The narrow claim asserted is that the denial to a registrant of procedural due process by a Selective Service Agency renders its order void; and its invalidity may be asserted in a defense to a criminal prosecution under the Selective Training and Service Act.

More particularly and more narrowly the critical issues in the instant case may be thus stated: May a registrant prosecuted under the Selective Training and Service Act for violation of an order of a Selective Service Agency assert as a defense to said prosecution that the order is void because it violates due process of law and the regulations of the Selective Service System in that a Hearing Officer refused to inform the registrant (who claims to be a conscientious objector) as to the general nature and character of any evidence unfavorable to him; and in addition, the Hearing Officer misleads the registrant by advising him there was no evidence against him, and then the Hearing Officer bases his ruling against the registrant, upon such information.

Additionally, is the denial of a personal hearing by a local Draft Board, a denial of due process and a violation of the regulations of the Selective Service System; and can such denial be asserted as a defense?

ARGUMENT.

Point 1. Falbo v. United States Is Not Determinative of the Issue in the Instant Case.

In *Falbo v. United States*, 320 U. S. 549, the Supreme Court, as quoted by the appellee (Brief for Appellee, p. 4) decided merely the following narrow question: "The narrow question therefore presented by this case is whether Congress has authorized judicial review of the propriety of a board's classification in a criminal prosecution for wilful violation of an order directing a registrant to report for the last step in the selective process. We think it has not."

The availability of judicial review "of the propriety of a board's classification" is not the issue in the case at bar; the issue, as heretofore stated, is rather whether denial of procedural due process and the violation by a Hearing Officer of an express instruction outlining the nature of due process, issued by the Department of Justice itself, makes a Draft Board order void so that one who is prosecuted for violating it may defend against it.

Point 2. Gutman v. United States (C. C. A. 9), No. 10488, Is Not Decisive.

The *Gutman* case was decided by this Court without opinion.

The appellant in that case, as correctly pointed out by the appellee in its brief, made no reference to the *Falbo* case at all. The Court might well have concurred in the view of the appellee that the appellant's failure to distin-

guish or even mention the *Falbo* case constituted in effect a concession that the Falbo decision by the Supreme Court determined all of the issues in the *Gutman* case. Additionally, the *Gutman* case did not involve a claim of denial of due process by a Hearing Officer; nor were the instructions proffered by the appellant in the case at bar, submitted to the District Court in the *Gutman* case, nor an issue on appeal.

In the instant case the following instruction in part was requested by the appellant and rejected by the District Court below:

> "You are further instructed that an opportunity to be heard includes an opportunity furnished to the registrant to know the nature and import of any evidence in the possession of the hearing officer adverse to the registrant, so that the registrant may be afforded the right and opportunity to meet or otherwise refute such adverse evidence.
>
> "You are further instructed that a finding by a hearing officer, or a recommendation by a hearing officer based upon evidence or information not made known to the registrant and without affording the registrant an opportunity to meet or refute such evidence, is not in accord with due process of law, and makes such finding or recommendation arbitrary and capricious; and a hearing resulting in such findings or recommendation is not a fair hearing as required by due process of law." [Part of Defendant's Requested Instruction No. 1, R. 106, 107.]

The pertinency of such an instruction, and the error of the trial court in rejecting it is seen from the follow-

ing: "Instructions and directions to registrants claiming exemption as conscientious objectors" issued by the Department of Justice [Defendant's Exhibit "D", R. 85, 86], assure a registrant, who is a conscientious objector, that he is entitled to notice of information in the possession of the Hearing Officer, which is adverse to the registrant. It provides [R. 85, 86]:

> "4. At the hearing, the registrant, at his request, will be informed by the Hearing Officer as to the general nature and character of any evidence disclosed by the investigation which is unfavorable to, or tends to defeat, his claim for exemption as a conscientious objector, and the registrant will be afforded an opportunity to explain or rebut such evidence."

Moreover, the instructions assure that information the source of which is not disclosed to the registrant shall not be used by the Hearing Officer as the basis for a ruling adverse to the registrant. Thus the Department of Justice's "Memorandum to Hearing Officers Appointed Pursuant to Section 5(g) of the Selective Training and Service Act of 1940" [R. 99, 102], reads:

> "A clear and succinct statement of the facts which will apprise the registrant of the objections raised to granting his claim is sufficient. *However, no Hearing Officer should make any finding of facts detrimental to the registrant which is based upon information, the source of which is not disclosed to the registrant.*" (Italics ours.)

The appellant was not only the victim of a report by the Hearing Officer recommending the rejection of his

claim as a conscientious objector, based upon information adverse to the registrant, the sources of which were not disclosed to the appellant,[1] but the Hearing Officer misled the appellant by advising him that there wasn't any evidence against him, after the Hearing Officer was expressly asked if there was such adverse evidence. [R. 89, 98.]

The information upon which the Hearing Officer relied was substantially and prejudicially false. [R. 90.] The appellant, however, was never afforded an opportunity to demonstrate to the Hearing Officer the falsity of the charges against him.

Additionally, there was evidence that the registrant's local Draft Board did not accord the defendant a personal hearing as expressly required by the regulations. (The pertinent regulations are set forth in Appendix A, annexed to this brief.) The appellant testified that he was not "given an opportunity to present any evidence" and was not given a personal hearing in connection with his classification [R. 83]; that on the occasion when he appeared before the Board the only matter discussed was that of an appeal to be taken by him from the classification of the Board theretofore given him as I-A. The testimony of the defendant is corroborated by the official records of the local Draft Board which contain no minute order of any personal hearing accorded the appellant. According to the minutes kept by the Board the appellant ap-

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[1]"Report of Hearing Conducted by the Department of Justice Pursuant to Section 5(g) of the Selective Training and Service Act of 1940." Defendant's Exhibit "C" [R. 65].

peared on October 5, 1942, "*re* appeal, no action." [R. 42.][2] On October 8, 1942, the appellant was given a I-A. [R. 41.]

Despite this showing, the trial court in effect directed the jury to disregard this evidence by refusing to give the following instruction requested by the appellant [R. 110]:

> "You are instructed that under the Rules and Regulations of the Selective Service system a registrant who objects to a classification given him by a local draft board, has the right to request a personal appearance and hearing before said local board; that the registrant at said hearing is entitled to present evidence or information to the board supporting his claim for a classification, and is entitled to have evidence heard and considered by said local board.
>
> "You are further instructed that if a local board refuses to permit a registrant to produce such evidence, or if a local board refuses to consider said evidence, that said hearing violates due process of law; is arbitrary and capricious and an order resulting from such a hearing is void."

That evidence showing a failure to accord a personal hearing to a registrant may be proffered as a defense to a criminal prosecution is the import of a noteworthy unreported opinion by United States District Court Judge A. F. St. Sure. The text of the opinion is set forth in Appendix B.

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[2]On the last sheet of a registrant's questionnaire there is a space for the Board to make minutes of action taken by it. These records are made by a member or agent of the Board.

The record in the instant case discloses, accordingly, a gross violation on the part of the Hearing Officer not only of rights assured the appellant by the Selective Service System itself, through appropriate instructions to Hearing Officers, but the right to notice of information adverse to him—a right inherent in due process and implicit in the administration of an administrative system consistent with constitutional right and fair dealing.

Due process moreover, was violated by the local Draft Board itself in failing to accord the registrant a personal hearing. This failure constituted a direct violation, in addition, by the local Board of the Selective Service Regulations 625.1 and 625.2. [Appendix A.]

Conclusion.

The *Falbo* case may not be used as a "trap"[3] to ensnare the sincere conscientious objector; nor does it, or was it intended to, annul the constitutional guarantees of freedom of religion and to due process of law.

Respectfully submitted,

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[3]The phrase is from *Billings v. Truesdell*, United States Supreme Court. decided March 27, 1944.

APPENDIX A.

REGULATIONS, SELECTIVE TRAINING AND SERVICE SYSTEM.

Part 625—Appearance Before Local Board

Sec.

625.1 Opportunity to appear in person.

625.2 Appearance before local board.

625.1. Opportunity to appear in person. (a) Every registrant, after his classification is determined by the local board (except a classification which is itself determined upon an appearance before the local board under the provisions of this part), shall have an opportunity to appear in person before the member or members of the local board designated for the purpose if he files a written request therefor within 10 days after the local board has mailed a Notice of Classification (Form 57) to him. Such 10-day period may not be extended, except when the local board finds that the registrant was unable to file such request within such period because of circumstances over which he had no control.

(b) No person other than the registrant may request an opportunity to appear in person before the local board.

(c) If the written request of the registrant to appear in person is filed with the local board within the 10-day period or if it is filed after such 10-day period and the local board finds that the registrant was unable to file such request within such period because of circumstances over which he had no control, the local board shall enter upon the Classification Record (Form 100) the date on which the request was received and the date and time fixed for the registrant to appear and shall promptly mail to

the registrant a notice of the time and place fixed for such appearance.

(d) If such a written request of a registrant for an opportunity to appear in person is received after the 10-day period following the mailing of a Notice of Classification (Form 57) to the registrant, the local board, unless it specifically finds that the registrant was unable to file such a request within such period because of circumstances over which he had no control, should advise the registrant, by letter, that the time in which he is permitted to file such a request has expired, and a copy of such letter should be placed in the registrant's file. Under such circumstances, no other record of the disposition of the registrant's request need be made.

625.2 Appearance before local board. (a) At the time and place fixed by the local board, the registrant may appear in person before the member or members of the local board designated for the purpose. The fact that he does appear shall be entered in the proper place on the Classification Record (Form 100). If the registrant does not speak English adequately, he may appear with a person to act as interpreter for him. No registrant may be represented before the local board by an attorney.

(b) At any such appearance, the registrant may discuss his classification, may point out the class or classes in which he thinks he should have been placed, and may direct attention to any information in his file which he believes the local board has overlooked or to which he believes it has not given sufficient weight. The registrant may present such further information as he believes will assist the local board in determining his proper classification. Such information shall be in writing or, if oral,

shall be summarized in writing and, in either event, shall be placed in the registrant's file. The information furnished should be as concise as possible under the circumstances. The member or members of the local board before whom the registrant appears may impose such limitations upon the time which the registrant may have for his appearance as they deem necessary.

(c) After the registrant has appeared before the member or members of the local board designated for the purpose, the local board shall consider the new information which it receives and shall again classify the registrant in the same manner as if he had never before been classified, provided that if he has been physically examined by the examining physician, the Report of Physical Examination and Induction (Form 221) already in his file shall be used in case his physical or mental condition must be determined in order to complete his classification.

(d) After the registrant has appeared before the member or members of the local board designated for the purpose, the local board, as soon as practicable after it again classifies the registrant, shall mail notice thereof on the Notice of Classification (Form 57) to the registrant and on Classification Advice (Form 59) to the persons entitled to receive such notice or advice on an original classification under the provisions of section 623.61.

(e) Each such classification shall be followed by the same right of appeal as in the case of an original classification.

APPENDIX B.

In the Southern Division of the United States District Court for the Northern District of California.

United States of America, Plaintiff, vs. John Gilbert Laier, Defendant. No. 28036-S.

Opinion.

St. Sure, District Judge:

The Grand Jury presented an indictment against the defendant charging him with failing to report for induction under the Selective Training and Service Act of 1940, 50 USCA App. 301 *et seq.* The case was tried to the Court without a jury. At the close of the trial defendant moved to dismiss the indictment on the ground that the evidence was insufficient to support the charge.

The facts are undisputed. Defendant is a registrant of Local Board No. 112 at Palo Alto, California. After he was classified by that board in class 1-A he requested an opportunity to appear in person before the board as was his right under the provisions of Rule 625.1 of the Selective Service Regulations. His request was denied. He then appealed to Board of Appeal No. 9 at San Jose, which affirmed the action of the local board in classifying the registrant in class 1-A. Thereafter the local board ordered defendant to appear for induction on May 22, 1943, and the indictment is predicated upon his failure to comply with that order.

Defendant contends that because of the failure of the board to permit him a personal appearance, he was denied due process of law, with the result that the board never acquired jurisdiction to issue an order of induction; that

the order of induction issued was void and the registrant was under no legal duty to comply with it.

The Government argues that the failure of the board to grant a hearing is no defense in the present prosecution but can only be the subject of a habeas corpus proceeding after induction of the registrant; and that regardless of the rule permitting a hearing, the appeal cured any error committed by the local board.

In support of its first contention the Government cites U. S. v. Griemes and U. S. v. Sadlock, 129 F. (2nd) 811. In those cases defendants, who were Jehovah's Witnesses, attempted to introduce evidence that they should have been classified as ministers of the gospel and that the board acted arbitrarily and capriciously in classifying them as conscientious objectors. The court held that whether or not the board acted arbitrarily and capriciously was a matter to be determined on writ of habeas corpus and that it was not a defense to a criminal prosecution for failure to report for induction. In its opinion the court stated that "whether a registrant is a minister of religion presents a question of fact which, from its very nature, is committed by the act to the determination of the competent local draft board."

There is a practical reason for this rule, because to permit a court or jury in prosecutions for draft evasion to determine whether the defendant was in fact properly classified would have the effect of nullifying the power expressly committed to the draft boards to classify registrants. A similar thought is expressed in U. S. *ex rel.* Koopowitz v. Finley, 245 Fed. 871, which arose under the Selective Draft Act of 1917; Whether a person is a non-declarant alien or not is a question of fact, exactly

the same as whether a person is a duly ordained minister of religion . . ., and the clear purpose of the act was that the fact should be ascertained by the administrative boards which the President was authorized to create. Any other method would have made the act, . . . unworkable."

The Government also cites Fletcher v. U. S., 129 Fed. (2nd) 262, where the same contention was made by the defendant, and the court held that evidence as to whether the board acted arbitrarily and capriciously was properly refused.

It may well be that where the record shows compliance with the regulations made for the protection of the registrant, and it is a question of fact and law this question should properly be determined on habeas corpus. But I am of the opinion that where, as here, the record itself shows that the draft board has disregarded the regulations and has exceeded its jurisdiction in classifying a registrant, the order to appear for induction is void as a matter of law and the indictment predicated thereon is subject to a motion to dismiss.

The provisions of Rule 625.1 are mandatory: "Every registrant . . . shall have an opportunity to appear in person . . ." under conditions which, it is admitted, the registrant complied with. Rule 625.2(c) provides in part: "After the registrant has appeared . . . the local board shall consider the new information which it receives and shall again classify the registrant in the same manner as if he had never before been classified. . . ." Rules 625.2(d) and (3) require that the draft board, after the personal appearance of the registrant, shall mail a new notice of classification to him which is subject to the same

right of appeal as the original classification. Rule 625.3 provides that if the registrant requests a personal appearance he shall not be inducted until 10 days after the new notice of classification referred to in 625.2(d) is mailed to him by the local board.

From the above provisions it clearly appears that the registrant is entitled to a hearing as a matter of right. And it is settled law that such a personal hearing is a part of due process in such proceedings. 16 C. J. S. 622; St. Joseph Stockyards Co. v. U. S., 298 U. S. 38; Yamatoya v. Fisher, 189 U. S. 86.

It is also apparent that the application for an opportunity to be heard actually suspends the classification of the registrant who after such hearing must be reclassified "in the same manner as if he had never before been classified," and that he may not be inducted until ten days after he receives the new notice of classification.

Admittedly, the local board failed to comply with these provisions, and the effect of such failure would seem to be that the registrant was not classified at all, nor could be legally be inducted, at the time it made its order. In issuing its order, the board acted entirely outside its jurisdiction and without any legal authority.

The government further contends that the appeal by registrant to the Board of Appeal cured any error that the local board may have committed. It is urged that because the defendant furnished the appeal board with all the information that he might have presented at a hearing before the local board he was not prejudiced.

The fact that the Board of Appeal sustained the classification made by the local board in no way lent legality to its erroneous procedure. Defendant was entitled under

the Regulations and as a part of due process of law to make a personal appearance. As well might it be said that an accused who was incarcerated during a criminal trial but permitted to submit a written statement of his case in court and present his case. Moreover, if the regulations had been followed, defendant would have been entitled to an appeal from the new classification, which in his case was never made.

The Government cites Bowles v. U. S., 319 U. S. 33, as supporting its contention. There the defendant contended that the local board misinterpreted the act in classifying him. A final appeal by the registrant to the President had been granted, and the Director on that appeal made a determination of fact adverse to the claim of petition that he was a conscientious objector. The Supreme Court held that this determination superseded that of the local board, that the order for induction was based upon that determination, and that therefore, whether or not the registrant was given a fair hearing before the local board was not a defense to the criminal prosecution. Where facts are determined *de novo* on appeal, the appellant is not prejudiced by error committed by the inferior fact-finding body. In the present case, however, the objection is not made primarily to the facts as found by the local board but to the fact that defendant was denied his lawful right to appear in person and be heard. This error, it would seem, could be cured only by granting such hearing.

The motion to dismiss the indictment will be granted.

Nov. 8, 1943.